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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' SUPPLEMENTAL BRIEF ON REARGUMENT.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' SUPPLEMENTAL BRIEF ON REARGUMENT.

This case was originally docketed as Number 52, October Term, 1947, and argued orally on October 24, 1947.

On June 21, 1948, the Court ordered the case restored to the docket for reargument, and requested counsel, in briefs and on oral argument, to discuss specified questions in so far as they are relevant to the case. Supreme Court Journal, June 21, 1948, pp. 296-8.

Pursuant to such order, this Supplemental Brief discusses the specified questions, repeating only such part of the argument, made in Petitioners' original Brief and Reply Brief, as is required to present the case coherently. Petitioners, however, pray that, upon reargument, the Court consider their original Brief and Reply Brief (herein referred to as the "Brief" and "Reply Brief") in conjunction with this Supplemental Brief.

The *opinion of the Tax Court* (R. 126) is not officially reported. The *opinion of the Court of Appeals* (R. 151) is reported in 159 F. 2d 257.

The *jurisdiction* of the Court is under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

1. See also section 1254(1), Title 28, United States Code, as amended by section 1 of Public Law 773, 80th Congress, 2d Session, effective September 1, 1948.

STATEMENT.

Decedent, Sidney M. Spiegel, died in 1940 (R. 25). In 1920, decedent, who was a resident of Illinois (R. 25), transferred certain securities by a written instrument to himself and another Illinois resident as trustees (R. 25).

The trust (R. 86-7) provided for payment of income, during decedent's lifetime, equally to or for the benefit of decedent's three children, named in the trust. Upon his death, corpus was to be divided equally among the same three children. If, however, any of Spiegel's children died leaving children surviving, the children of the deceased child would receive the share to which their parent would have been entitled; or, if any of Spiegel's children died leaving no child surviving, the deceased child's share would go to Spiegel's other children and the descendants of his other deceased children.

No provision was made for reversion of the trust property to decedent or his estate under any circumstances. Decedent retained no power to alter, amend or modify the trust and no power of appointment. It is stipulated that the gift in trust was not in contemplation of death (R. 26).

At the creation of the trust, decedent was a widower, 47 years old (R. 25). His three children, named in the trust, were his only children and were then 23, 15 and 13 years, respectively (R. 25). Decedent died, aged 68 years and without remarrying, and was survived by the three children who were then 44, 36 and 34 years, and, in addition, by three grandchildren who were then 10, 4 and 2 years (R. 25).

From and after execution of the trust, all income was distributed to or for the benefit of decedent's three children

(R. 25). Upon decedent's death, the three children received corpus of the trust in equal shares (R. 26).

The attorney, who drew the trust, testified (R. 34-5) that Spiegel had, on several occasions prior to drafting the instrument, stated that he desired and intended the trust property to be transferred to trustees for the benefit of his children and wanted, at no time, to have any interest or title therein.

Petitioners did not include any part of the value of the trust estate in gross estate returned for estate taxes (R. 26). Respondent, however, claimed that the trust was a transfer intended to take effect in possession or enjoyment at or after decedent's death within the meaning of section 811(c) of the Internal Revenue Code (R. 21, 29). He, therefore, increased the value of the gross estate, as returned, by $1,151,189.21 (of which amount substantially all —$1,140,606.30—represented the value of trust corpus; R. 9, 26) and asserted an estate tax deficiency of $454,788.58 (R. 8).

The Tax Court, on petition for redetermination, held that the trust was not properly included in gross estate since decedent had retained no interest therein (R. 129), and, further, that Petitioners were entitled to a refund of $2,423.95 on account of an executor's fee which had been paid but not deducted in the return (R. 133).

Respondent petitioned the Court of Appeals to review the decision of the Tax Court (R. 134). The Court of Appeals reversed the Tax Court and held that the value of the corpus of the trust was properly included in gross estate of the decedent, deciding that the children's interests in corpus were contingent remainders (R. 153-4) and that, therefore, there was a possibility of the trust failing and the property reverting to the settlor by operation of governing Illinois law.

Petitioners petitioned this Court for a Writ of Certiorari which was granted (R. 211).

The *assigned errors*, intended to be urged, are stated on page 6 of the Brief.

The *Statute involved* is set out on page 7 of the Brief.

The *questions presented* are listed on page 8 of the Brief.

PROPOSITIONS RELIED UPON.

The corpus of the trust should not be included in gross estate for the following reasons, presented and argued in detail in the Brief and Reply Brief:

1. The trust was a completed gift upon its creation and there is no liability for estate taxes with respect thereto. Since decedent retained no express right of reversion and had no possibility of reverter by operation of governing Illinois law, there was nothing to pass from decedent—no right or interest of decedent to cease—upon his death.

See Brief pp. 14-29 and Reply Brief pp. 2-12.

The trust created vested remainders in each of the three named children, subject to divestment only in favor of other named children and descendants of children, but under no conditions in favor of decedent. See Brief pp. 17-20. Accordingly, no one, other than the children and their descendants, could possibly take. There can be no possibility of reverter by operation of Illinois law after a vested remainder, and a vested remainder can be divested only in favor of the identical persons specified in the instrument and then only upon occurrence of the exact conditions specified for divestment. In the case at bar, therefore, divestment of a child's vested remainder could occur only if a named child died and if, in addition, one or more of his children or one or more of Spiegel's other named children or their descendants survived to take. Otherwise, the deceased child's vested remainder would not be divested and would pass upon his death to his legatees or next of kin. See Brief pp. 21-25 and Reply Brief pp. 2-5.

2. The decision in Reinecke v. Northern Trust Company, 278 U. S. 339 (1929), is on all fours with the instant case, is the authority on which the Tax Court decided this case, and is controlling. Under Reinecke principles, the trust, here, was a completed gift and the corpus may not be included in gross estate.

See Brief pp. 30-34 and Reply Brief pp. 12-14.

3. Even though decedent had retained a remote possibility of reverter by operation of Illinois law, nevertheless the trust corpus would not be taxable under section 811(c) of the Internal Revenue Code.

See Brief pp. 34-46 and Reply Brief pp. 15-18.

No decision of this Court has passed upon whether existence of a possibility of reverter, solely by operation of law, renders a transfer taxable, under section 811(c), as intended to take effect at death. However, the Court has held that transfers in contemplation of death and transfers intended to take effect at or after death (both covered by section 811(c)) are in the same category and that, "as the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive." *United States* v. *Wells*, 283 U. S. 102, 117 (1931). Thus, a transfer cannot be *intended* to take effect at or after a transferor's death if the transferor *intended* to make an immediate, complete gift.

Unless intent to make a transfer effective only at or after death exists, the transfer does not fall within section 811(c), and intent, like any other fact, is a question for the Tax Court. Retention of an express reverter always evidences intent to retain a string or tie. But, where a reverter can arise only by operation of law, intent to retain an interest may or may not exist.

There is no evidence that Spiegel intended to postpone

completion of the transfer in trust. To the contrary, the evidence is uncontradicted, and the "extrinsic circumstances" (relied upon by the Tax Court in this type of case) make it clear, that he intended to retain no interest in the trust property. See Brief pp. 36-42. See also, additional discussion at pp. 18-21, *infra*.

Further, cessation, at death, of a remote possibility of reverter (such as Respondent alleges existed here), arising solely by operation of local law, does not effect a transfer or cessation of anything real at death. To hold otherwise, would be to disregard substance. See Brief pp. 42-45.

4. Under principles laid down by this Court in Dobson v. Commissioner, 320 U. S. 489 (1943), the Court of Appeals had no authority to review the Tax Court's holding that "decedent in creating the trust retained no 'string or tie' amounting to a possibility of reversion."

See Brief pp. 46-52.[2]

2. Section 1141(a) of the Internal Revenue Code was amended by section 36 of Public Law 773, 80th Congress, 2d Session, to provide (effective September 1, 1948) that the Courts of Appeals may review decisions of the Tax Court to the same extent as decisions of the District Courts in civil actions tried without a jury This amendment will nullify *Dobson* as applied to cases arising in the future. It is submitted, however, that the amendment is inapplicable to, and has no effect upon, cases pending in this Court prior to September 1, 1948, on writs of certiorari granted prior to that date.

QUESTIONS SPECIFIED FOR DISCUSSION UPON REARGUMENT.

There follows discussion of questions, relevant to the case at bar, specified by the Court in its reargument order:

Question 1. Assuming that, under the applicable state law, there was no possibility of reverter and no interest of any other kind retained or arising in favor of the settlor or his estate under the transfer made in trust, inter vivos, did section 811(c) of the Internal Revenue Code require that the value of the corpus of the trust be included in the settlor's gross estate for federal estate-tax purposes? That is, did section 811(c) require the inclusion in the gross estate of the settlor of the value of the corpus of a trust, created inter vivos, merely because the settlor had provided in it that, upon his death, the trust should terminate and the corpus be distributed to designated beneficiaries then surviving?

This question is answered in the negative by *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 (1929). *Reinecke* decided squarely that, if a decedent transfers his entire beneficial interest in property to trustees during his lifetime (as did Spiegel), the trust property may not be included in the decedent's gross estate merely because the trust terminates upon the settlor's death and corpus is then distributed to designated beneficiaries.[3]

The Decision in Reinecke.

The question, put by the Court here, was required to be decided in *Reinecke*. The Government's *Reinecke* brief had

3. Provisions of the *Reinecke* trusts are set out in the Brief at pp. 30-31.

set out (p. 13), as the first point of the Argument, the following (also found in 278 U. S. at p. 341):

> "A trust, under which the corpus cannot be distributed until after the death of the settlor, is a trust 'intended to take effect in possession or enjoyment at or after' the death of settlor, within the meaning of section 402(c) of the Revenue Act of 1921."

This Court, accordingly, said:

> (p. 347) "But the question much pressed upon us remains, whether, the donor having parted both with the possession and his entire beneficial interest in the property when the trust was created, *the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed, and after the enactment of the statute, is included within its taxing provisions.*" (Italics ours.)

As in the case at bar, the *Reinecke* life tenants and remaindermen were the same persons.

The question having been put, the Court answered it unequivocally, saying:

> (pp. 347-8) "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. Cf. *Y.M.C.A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 62; *N.Y. Trust Co.* v. *Eisner*, 256 U. S. 345, 349. It is not a gift tax * * *. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but *we are asked to say that this statute means that he may not make a gift inter vivos, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death.* It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute." (Italics ours.).

Reinecke followed necessarily from prior decisions of the Court, construing the Federal estate tax statutes (in force since 1916) as laws which, different from State inheritance tax statutes, tax

> "not the interest to which some person *succeeds* on a death, but the interest which *ceased* by reason of the death."

See *Edwards* v. *Slocum*, 264 U. S. 61, 62 (1924); *Y.M.C.A.* v. *Davis*, 264 U. S. 47, 50 (1924); *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921); *Nichols* v. *Coolidge*, 274 U. S. 531, 537 (1927).[4] Those decisions, thus, held that, if a decedent's interest in property, transferred *inter vivos*, ceased prior to his death, there could remain no interest therein to cease at or by reason of his death, and, hence, no estate tax on account of the completed transfer. It was inevitable, then, that *Reinecke* should decide that property, in which decedent had no interest at death, could not give rise to an estate tax merely because the property was distributable at death.

Indeed, Respondent, although he seeks unduly to limit *Reinecke*, recognizes that *Reinecke* squarely answers the question, now raised, in the negative. Respondent states, in his brief here (p. 25), that *Reinecke* stands:

> "* * * for the proposition that where the grantor of a trust has parted with both the possession and the entire beneficial interest in the property, retaining no possibility of reversion, *the mere passing of possession or enjoyment of the trust fund from the life tenant to the remainderman after the grantor's death, as directed in the trust instrument, is not sufficient to subject the property to inclusion in the gross estate as a transfer intended to take effect at or after death.*" (Italics ours.)

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4. See *Knowlton* v. *Moore*, 178 U. S. 41 (1900), for history of Federal death taxes prior to 1916. See also, Origin of the Phrase, "Intended to Take Effect in Possession or Enjoyment at or After Death" (Section 811(c), Internal Revenue Code), 56 Yale L. J. 176 (1946).

Further, Respondent's Regulations provide that, in order to constitute a transfer one intended to take effect in possession or enjoyment at or after death, decedent or his estate must, at death, possess some right or interest in the property transferred. Regulations 105, section 81.17.

Congress Has Confirmed the Reinecke Construction.

Congress has adopted the *Reinecke* construction. *Reinecke* was decided in January, 1929. Section 302(c) of the Revenue Act of 1926 (applicable to transfers in contemplation of death or intended to take effect in possession or enjoyment at or after death) was then in force. The provisions of section 402(c) of the Revenue Act of 1921, which were actually before the Court in *Reinecke*, were, so far as material here, the same as those of section 302(c) of the 1926 Act.

After *Reinecke*, the Joint Resolution of March 3, 1931, amended section 302(c) of the 1926 Act to make taxable those transfers (in 1930 held to be nontaxable by *May* v. *Heiner*, 281 U. S. 238) in connection with which the transferor retained income or other enjoyment of the property transferred. The statutory language, construed in *Reinecke*, was left unchanged. Thereafter, section 803(a) of the Revenue Act of 1932 further amended the portion of section 302(c) of the 1926 Act, which had been added by the 1931 Joint Resolution, as well as the portion dealing with transfers within two years prior to death. The part of section 302(c), construed in *Reinecke*, was reenacted without change. Section 302(c), as amended by the 1931 Joint Resolution and the Revenue Act of 1932, is in force today as section 811(c) of the Code. Thus, since *Reinecke*, section 302(c) of the 1926 Act has been amended twice, and, as amended, incorporated into the Code. However, no amendment has affected the statutory language construed in *Reinecke*; that language remains today just as it was when *Reinecke* was decided.

Further, since the 1939 codification and prior to Spiegel's death, the estate tax laws were amended by the Revenue Act of 1939 and the First Revenue Act of 1940, and, after his death, by the Revenue Act of 1941, the Revenue Act of 1942, the Current Tax Payment Act of 1943, the Revenue Act of 1943, and the Revenue Act of 1948. None of such amendments, however, has affected section 302(c) of the 1926 Act, as amended and included in the Code. There have also been attempts, both before and since *Reinecke*, to adopt a Federal inheritance tax on successions by beneficiaries, but Congress has rejected them. See 1 Paul, Federal Estate and Gift Taxation (1942), pp. 11-14.

With this legislative background, it is clear that Congress concurred in, and confirmed, the *Reinecke* construction. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 487-9 (1940); *Helvering* v. *Wimmill*, 305 U. S. 79, 83 (1938). Cf. *Helvering* v. *Safe Deposit & Trust Co. of Baltimore*, 316 U. S. 56, 59-61 (1942).

The Court Has Followed the Reinecke Construction.

The dissenting opinion in *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39 (1935), is based upon the *Reinecke* holding that a completed *inter vivos* gift in trust is not subject to estate tax, and states (p. 46):

> "Although the tax is a death tax, § 302(c) nevertheless applies to any interest in gifts *inter vivos*, which, by their provisions, are 'intended to take effect in possession or enjoyment at or after death', and such gifts are subjected to the tax as a death tax *if they are not complete until the donor's death*. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 345; *Klein* v. *United States*, 283 U. S. 231. The decedent's death, operating upon his gift *inter vivos not complete until his death*, is the event which calls the statute into operation. *Klein* v. *United States*, *supra*, 234." (Italics ours.)

Mr. Justice Stone, who wrote this dissenting opinion, also wrote the opinion in *Reinecke*, and Mr. Justice Brandeis, one of the dissenting Justices, had joined in the *Reinecke* opinion.

Helvering v. *Hallock*, 309 U. S. 106 (1940), adopted the construction of the dissenting opinion in *St. Louis Union Trust Co.*, stating (p. 110):

> "Whether the transfer made by the decedent in his lifetime is 'intended to take effect in possession and enjoyment at or after his death' *by reason of that which he retained*, is the crux of the problem." (Italics ours.)

It must follow that, if a decedent retains no interest in property transferred *inter vivos*, the transfer was not intended to take effect at or after his death. *Hallock*, too, is based on, and entirely consistent with, *Reinecke*.[5]

Reinecke Construction Should Not Be Rejected.

Decision, here, that section 811(c) of the Internal Revenue Code requires the value of corpus to be included in gross estate merely because distribution was at death will require overruling *Reinecke*. However, *Reinecke* cannot be overruled without overruling *Edwards* v. *Slocum* and the other decisions of this Court, which construe the Federal estate tax laws as taxing, not the interest to which a *beneficiary succeeds* on the death of a decedent, but the interest of a *decedent* which *ceases* upon his death. An utterly new concept of estate taxes must be adopted if the Court should overrule *Reinecke* and now hold that, notwithstanding cessation of all decedent's interest in trust property before death, nevertheless, if the property is *distributed* at death,

5. See *Bankers Trust Co.* v. *Higgins*, 136 F. 2d 477, 478 (CCA 2d, 1943); *Commissioner* v. *Lasker's Estate*, 141 F. 2d 889, 890 (CCA 7th, 1944); *Wishard* v. *United States*, 143 F. 2d 704, 708 (CCA 7th, 1944); *Commissioner* v. *Irving Trust Co.*, 147 F. 2d 946, 948-49 (CCA 2d, 1945).

it is, solely because of the *time* of distribution, required to be included in gross estate.

In *Helvering* v. *Hallock*, *supra*, the Court said (p. 122):

> "• • • we cannot evade our own responsibility for reconsidering, in the light of further experience, the validity of distinctions which this Court has itself created. *Our problem then is not that of rejecting a settled statutory construction.* The real problem is whether a principle shall prevail over its later misapplications." (Italics ours.)

For over twenty years, *Reinecke* has not been questioned. To the contrary, its construction of the estate tax laws has been confirmed by the Congress and this Court. Overruling *Reinecke* does not involve reconsideration of distinctions which the Court has created but the rejection of basic differences, created and perpetuated by the Congress (and long recognized by the Court), between Federal estate and State inheritance tax statutes. It involves holding, for the first time, that the Federal estate tax taxes succession to property by a beneficiary (as do State inheritance tax laws) and not the *transfer* of property from the dead. Cf. *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 269-70 (1928). There is no question here "whether a principle shall prevail over its misapplications." Overruling *Reinecke* requires purely and simply "rejecting a settled statutory construction," and this Court said, in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938), that:

> (p. 77) "If only a question of statutory construction were involved we should not be prepared to abandon a doctrine so widely applied throughout nearly a century."

The *Reinecke* doctrine has been applied since the adoption of the first Federal estate tax in 1916.

It is clear, we submit, that, under Illinois law, Spiegel retained no interest or possibility of interest of any

character in the trust corpus at his death. It is equally clear that, under the decisions of this Court, the mere fact that the trust terminated, and corpus was distributable, upon Spiegel's death does not throw into his gross estate any part of corpus, in which all of his interest ceased when the trust was created many years before his death.

Question 2. Assuming that, under the applicable state law, there arose, by operation of law, a possible reverter in favor of the settlor's estate, did section 811(c) require that the value of the corpus, in view of the record in the case, be included in the settlor's gross estate for federal estate-tax purposes?

This question is based upon the assumption (which we submit is erroneous) that, if Spiegel's three children and three grandchildren had all predeceased him, the trust corpus would have reverted to Spiegel by operation of Illinois law. However, even on that assumption, corpus was not required to be included in gross estate. The record is clear that decedent did not intend to retain any right or possibility of reverter in corpus, and, therefore, the *inter vivos* transfer in trust was not intended to take effect at his death. Further, any possibility of reverter, which may have existed, was so insubstantial as to be only a formal (not a real) interest in property.

Intent of Decedent Determines Taxability.

Section 811(c) taxes transfers *intended* to take effect at or after death and, like transfers in contemplation of death, also taxed under section 811(c), the motive or intent of the decedent determines taxability. This Court said, in *United States* v. *Wells*, *supra*, 283 U. S. at pp. 116-17 (referring to the counterpart of section 811(c), then in force) that:

"* * * The quality which brings the transfer within the statute is indicated by the context and manifest purpose. *Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor.* The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. * * * As the transfer may otherwise have all the indicia of a valid gift *inter vivos, the differentiating factor must be found in the transferor's motive.*" (Italics ours.)

Motive or intent "is a question of fact in each case." *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630, 636 (1946). It must be found like any other fact. The Tax Court finds intent from the trust instrument so far as practicable and, in addition and to the extent required, from "the framework of the extrinsic circumstances"—that is to say, from the surrounding facts. Its approach is typified in *Estate of Nettie Friedman, Deceased*, 8 T. C. 68 (1947), where it said:

(pp. 71-72) "Under these circumstances, a reasonable view is that the decedent, the grantor, had no thought of making transfers of property *inter vivos* with the intention that the property could revert to herself or to her estate, or could take effect only at or after her death. And the circumstances that the decedent did not make any more explicit provision in the trust instrument to cover the remote contingency that all of the beneficiaries might predecease her should be regarded as having little or no significance in this case because of the extrinsic circumstances, namely her age and the respective ages * * * of her nephews and grandnephews and nieces and grandnieces."

See also, *Estate of Gilliat G. Schroeder*, 6 T. C. M. Dec. No. 15,815(M) (1947); *Estate of Emma L. Keck, Deceased*, 10 T. C.—No. 144 (June 15, 1948); *Central Hanover Bank*

& Trust Company v. *United States*, 58 F. Supp. 565, 566-7 (Ct. of Cls., 1945).

The Trust Instrument Evidences Intent to Retain No Interest.

The trust instrument, here, made no express provision for reverter to the settlor under any conditions. It was drawn by an experienced attorney, who testified (R. 34-5) that, in connection with its preparation, Spiegel stated that he wanted no right or interest in the trust property and that he (the attorney) had tried to draft a trust which would carry out his client's directions. Spiegel's instructions to his attorney at the time the trust was being prepared are competent and relevant evidence of Spiegel's intent. See *Estate of Sallie E. Walton*, 42 B. T. A. 300, 302 (1940); *Estate of Benjamin P. O'Neal*, 6 T. C. M. Dec. No. 15,881 (M), pp. 717-18 (1947). See also, *United States* v. *Wells*, *supra*, 283 U. S. at pp. 112-13; *Williams* v. *Swango*, 365 Ill. 549, 556 (1937). This evidence of Spiegel's instructions is uncontradicted. In view of the fact that the question of retention of rights was considered, the omission of any "string or tie" is, on the record here, evidence that the omission was deliberate,—evidence that it was intended to retain no interest.

Relative Ages and the Numbers of Remaindermen Evidence Intent to Retain No Interest.

The "extrinsic circumstances" clearly evidence that the settlor had no intent to retain any interest. He was 47 years at the time the trust was created (R. 25). His wife had died many years before and he had not remarried. He had three children, each of whom was named a remainderman. At the inception of the trust, one child was nearly 13 years, another just over 15 years, and the third 23 years

(R. 25). On January 2, 1920, the date of execution of the trust, Spiegel, by actuarial computation, had less than 17 chances out of 1000 of outliving his three children (R. 35-6).[6]

He lived almost 21 years after the trust was executed and, when he died at 68 years, he was still a widower, his three children were still living, and, in addition, he then had three living grandchildren. His then chances of surviving his living children and grandchildren were less than 16 in 100,000 (R. 32), and any possibility of recovering by reverter the $1,140,000 of trust corpus, included by Respondent in gross estate, had a value of just under $85 (R. 32).

The record, here, evidences a very different intent than would have been the case if Spiegel, aged 47 years, had created a trust which provided that income, during the life of the settlor, should go to several persons, each of whom was 75 years at the creation of the trust, and that corpus, upon the settlor's death, should go to those same persons if they survived the settlor. In such a case (assuming a reverter by operation of law to exist in the event that the three aged remaindermen predeceased the settlor), the settlor's intent to retain a string or tie on corpus, and thus, under *Hallock*, to make a transfer which took effect only at his death, would be patent. He would, for all practical purposes, have been certain that he would outlive the remaindermen and get the property back.

Here, however, the settlor, aged 47 years, created a trust which (on any theory) could revert to him only in the event that he survived three persons, aged 13, 15 and 23 years, and all descendants of those persons. In the instant case, the settlor was about as certain as one could be that he would not outlive the remaindermen and would never get

6. This computation takes no account of the possibility that the children might marry and have descendants. See *Robinette v. Helvering*, 318 U. S. 184, 188-9 (1943).

the property back. As the Tax Court said, in *Francis Biddle Trust*, 3 T. C. 832 (1944):

> (p. 843) "* * * Thus, the creation of a trust for the benefit of an aged aunt by a comparatively youthful grantor may demonstrate a totally different intent from a gift to minor grandchildren and their issue and appointees, notwithstanding that the instruments of transfer are otherwise identical."

Immediate Payment of Income to Beneficiaries Evidences Intent to Retain No Interest.

Pursuant to the provisions of the trust, the entire income was paid to or for the children from the outset and for almost 21 years—until Spiegel's death (R. 25). It is, therefore, evident that decedent had no intention of retaining any string or tie on income, which he could have used during his lifetime and which, under then law, he might have retained without estate tax consequences. See *May* v. *Heiner*, 281 U. S. 238 (1930). Yet, it is claimed that he intended to retain a hold on corpus,—a hold which was of no practical value, a hold so tenuous as, for practical purposes, to be non-existent.

Value of Property Not Transferred Evidences Intent to Retain No Interest in Transferred Property.

By the trust, Spiegel gave his children approximately one-half of his property and retained the other one-half for himself, free of the trust. While the values of the trust property and of the free, retained property, at the time of the creation of the trust, do not appear, corpus of the trust was valued by Respondent at about $1,140,000 at date of death (R. 9) and Spiegel's own property was valued in the estate tax return, as at date of death, at $1,082,000 (R.

103).[7] Undoubtedly, therefore, one reason he did not wish to retain any string or tie, and directed his attorney to draw a trust under which he would not keep any interest, was that he had no need for the trust property. Be that as it may, it is hardly likely that a reasonable man, of large means, would have had any interest in a possibility as remote as the possibility of reverter by operation of law, claimed to exist here.

Prior to 1940, Any Intention to Retain Interest Would Have Been Expressed.

In any event, if Spiegel had intended to retain a possibility of reverter, there was, in 1920, no reason—tax or otherwise—why he should not have told his attorney that that was his intention and no reason why the attorney should not have included in the trust an express provision for a reverter. For many years prior to *Hallock*, it had been understood by the bar (and, in 1935, confirmed in *Helvering* v. *St. Louis Union Trust Company*, *supra*, and *Becker* v. *St. Louis Union Trust Company*, 296 U. S. 48) that, even if an express reverter were retained, the transfer in trust would not, for that reason, take effect at or after death or subject the settlor's estate to an estate tax. Unless, then, *Hallock* was anticipated by 20 years, the only reason for omission of an express reverter was Spiegel's intention *not* to retain any interest in the trust property.

7. Cf. *Estate of Moir*, 49 B.T.A. 765, 771 (1942), holding that retention of $4,000,000 of property is evidence that gifts of $3,000,000 were not intended as a testamentary substitute.

Regulations Recognize Injustice of Taxing Ante 1940 Trusts.

Respondent recognizes that, *after* the *St. Louis Union Trust Company* cases were decided, taxpayers relied upon those decisions until this Court's *Hallock* decision in 1940. Thus, section 81.17 of Regulations 105 provides that:

> "Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* * * * and *Becker* v. *St. Louis Union Trust Co.* * * *) and January 29, 1940 (that being the date upon which such Court rendered its decision in *Helvering* v. *Hallock* and companion cases * * *), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States*, * * * previously decided by such Court, *then the property so transferred shall not be included in the decedent's gross estate under the provisions of this section*, if the following condition is also met: such transfer shall have been finally treated for all gift tax purposes * * * as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the deceased should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death." (Italics ours.)

The instant case is obviously not classifiable as a *Klein* transfer. See Brief, p. 31. The deed in *Klein* v. *United States*, 283 U. S. 231 (1931), gave a life estate to the grantor's wife but expressly provided (pp. 232-33) that, if

she should predecease the grantor, she should take:

> "no greater or other estate in said lands and the *reversion in fee* in and to the same shall in that event *remain vested* in said grantor * * * such reversion being *hereby reserved* to said grantor and excepted from this conveyance." (Italics ours.)

Under the Regulations, therefore, if the trust at bar had been created in 1936, 1937, 1938 or 1939, instead of in 1920, and gift tax paid (there was no gift tax in 1920) and if the trust had *expressly* provided that corpus should revert to decedent if he survived all his children and grandchildren, the trust would not be taxable. *A fortiori,* the Regulations would not tax a reverter arising solely by *operation of law* under a trust created between 1936 and 1940. However, Respondent argues that, since the trust was created in 1920 *before* the *St. Louis Union Trust Company* decisions, it must be taxed even though those cases dealt with a statute which, so far as material and applicable here, had been in force unchanged since the passage of the first estate tax law in 1916. Cf. *In Re Mullins' Estate,* 71 N. Y. S. 2d 763, 764-6 (1947).

Interest, Alleged to Have Been Retained, Would Not Render Transfer Incomplete.

If a gift tax had been in force in 1920, the total value of the trust, now before the Court, would clearly have been taxed as a completed gift. Any possibility of reverter would have been so uncertain as to be disregarded. Thus, in *Robinette* v. *Helvering, supra,* the Court held that a retained remote reversionary interest (dependent upon the grantor's survival of remaindermen) was too unreal to prevent the transfer from being a present, completed and taxable gift, saying (318 U. S. at pp. 188-89):

> "In this case, however, the reversionary interest of the grantor depends not alone upon the possibility of survivorship but also upon the death of the daugh-

ter without issue who should reach the age of 21 years. The petitioner does not refer us to any recognized method by which it would be possible to determine the value of such a contingent reversionary remainder. It may be true, as the petitioners argue, that trust instruments such as these before us frequently create 'a complex aggregate of rights, privileges, powers and immunities and that in certain instances all these rights, privileges, powers and immunities are not transferred or released simultaneously.' *But before one who gives his property away by this method is entitled to deduction from his gift tax on the basis that he had retained some of these complex strands it is necessary that he at least establish the possibility of approximating what value he holds.* Factors to be considered in fixing the value of this contingent reservation as of the date of the gift would have included consideration of whether or not the daughter would marry; whether she would have children; whether they would reach the age of 21; etc. Actuarial science may have made great strides in appraising the value of that which seems to be unappraisable, but we have no reason to believe from this record that even the actuarial art could do more than guess at the value here in question. * * *'' (Italics ours.)

Nevertheless, when estate taxes are the issue, it is urged that a remote right of reverter by operation of law (which, in 1920, could become operative, on any theory, only upon the death before Spiegel's death of three children, aged 13, 15 and 23 years, and of all of the children whom those three children might bear if they married and had children and which, in fact, never became operative) is sufficiently real to establish a transfer as an incomplete gift, intended to take effect only at the settlor's death, and to require inclusion of over $1,140,000 of trust property in decedent's gross estate.[8]

8. Respondent (purporting to follow *Hallock*) has, in other cases, attempted to tax: (*a*) the possibility that a settlor might take corpus as a distributee of a deceased remainderman, *Commissioner v. Hall's Estate*, 153 F. 2d 172 (CCA 2d, 1946); *Estate of Ellen Portia Conger Goodyear*, 2 T. C. 885, 891-2 (1943); (*b*) the pos-

This Court has said that taxes are very real and that taxation is eminently practical. See *Helvering* v. *Safe Deposit & Trust Company of Baltimore*, 316 U. S. 56, 58 f. n. 1 (1942). Again, the dissenting Justices in *Helvering* v. *St. Louis Trust Company*, *supra*, 296 U. S. at p. 47, said "in determining whether a taxable transfer becomes complete only at death we look to substance, not to form." Yet Respondent contends that a possibility, which at Spiegel's death in 1940, had 16 chances out of 100,000 of ever occurring and was worth $85 actuarially, must, as a matter of law, subject property to an estate tax of more than $450,000 plus interest.[9] If Respondent prevails here, every trust will be taxable if it terminates upon the death of the settlor unless the ultimate remainder goes to the Government or,

sibility that a settlor might take corpus upon failure of a final remainder to charity, *Estate of Bertha Low*, 2 T. C. 1114, 1124 (1943); and (*c*) a possibility of reverter by operation of law, having an actuarial value of $0.0000000000876, in property valued at over $335,000 at death, *Estate of Ellen Portia Conger Goodyear*, *supra*, at p. 887.

9. See Report No. 2087 of House Ways and Means Committee on H. R. 6712, 80th Congress, 2d Session (Revenue Revision Bill of 1948, passed by House of Representatives, June 19, 1948):

(p. 7) "Under the present interpretation of the estate-tax law, the full value of transfers intended to take effect at or after death is included in a decedent's gross estate, even though his only interest in the property at the time of death is the possibility, however remote, that the donees will not survive the decedent, so that the transferred property will revert to the decedent or his estate or become subject to a power of disposition by the decedent. It has been held [*we assume by certain Courts of Appeals—not by the Supreme Court*] that the transferred property is includible in full in the decedent's gross estate even where the possibility of reverter exists only by operation of law. In short, taxability may rest upon a retained power of microscopic proportions which by inadvertence remained in the hands of the decedent.

"Your committee believes that the present law is unduly harsh. Section 202 of the bill provides that the amount includible in the decedent's estate shall not exceed the actuarial value of the decedent's reversionary interest just prior to his death. * * *"

possibly, a charity. It will not suffice to name any number of successive individual remaindermen because it is conceivable (if one jettisons reality and experience) that all of the remaindermen (no matter how numerous) will predecease the grantor.

The Court should adhere to reality and hold that the possibility of reverter (assuming that any possibility existed) was so remote as to make it certain that there was no intention to retain the possibility. As the Tax Court said in *Estate of Ellen Portia Conger Goodyear*, 2 T. C. 885 (1943):

> (p. 891) "* * * If taxation is a practical matter, we cannot shut our eyes to the practical certainty that decedent would not survive the others. It was certain enough, we think, to be given effect in the ordinary affairs of life, and if so it should be enough for tax purposes. And surely we cannot say that decedent *intended* to make the gift incomplete until her death by studiously reserving through silent implication of law a minute chance of recapture."

We have no quarrel with *Hallock*, *Stinson* or *Field*. Each dealt with a "string" or "tie" expressly retained. We submit, however, that, when, as here, a remote reverter by operation of law is involved, *intent* to retain a string or tie must first be found and the Tax Court, which treats intent in this type of case as a fact to be found from the record, is the proper forum to determine the question of intent to make a complete or incomplete transfer *inter vivos*. The record and law, here, are clear that Spiegel did not intend to, and did not, retain any interest in corpus, and the Tax Court correctly held (R. 129) that he "retained no 'string or tie' amounting to a possibility of reversion."

Question 3. Did section 811(c) of the Internal Revenue Code, in 1939, require the inclusion in the settlor's gross estate of the value of the corpus of a trust because the settlor, by its terms, had, in 1924, reserved to himself a right to the income of the trust until his death, the reservation thus being made before the March 3, 1931, amendment of that section?

Question 4. Were the joint congressional resolution of 1931 (46 Stat. 1516-1517), and subsequent related estate-tax statutes, intended to be a repudiation of this Court's May v. Heiner (281 U. S. 238) interpretation of the estate-tax statutes?

Question 5. Did the May v. Heiner estate-tax interpretation survive the congressional resolution and this Court's holding and opinion in Helvering v. Hallock (309 U. S. 106)?

These three questions are not relevant to the instant case, as Spiegel retained no interest in income of the trust at bar. The questions have reference to *Commissioner of Internal Revenue* v. *Church*, October Term, 1948, No. 5, which involves a trust under which income was reserved to the settlor.

Even though *May* v. *Heiner* and *Hassett* v. *Welch*, 303 U. S. 303, were to be overruled, *Reinecke* would be unaffected. *Reinecke* passed upon trusts in connection with which the settlor retained no income or other interest. Unlike *May* v. *Heiner* which was nullified *in futuro* by congressional action, *Reinecke* has, in effect, been confirmed by the Congress. See pp. 12-13, *supra*.

Question 6. Under section 811(c) is the "possession and enjoyment" of the corpus of an inter vivos trust "intended to take effect * * * at or after" the settlor's death, where he names himself as cotrustee with the broad control and administrative powers over the corpus and income here vested, and where the corpus is withheld from the beneficiaries until the settlor's death?

Respondent did not claim a deficiency (R. 21), and did not argue the case in either the Tax Court or Court of Appeals (R. 29-30, 135), on the theory that decedent's control, as cotrustee of a trust which terminated at settlor's death, was sufficient to convert an immediate transfer *inter vivos* into one effective only at death. Respondent has made no such argument here.

The transfer, here, took effect immediately notwithstanding the trust terminated at death. See pp. 9-10, *supra*. The circumstance that Spiegel was a cotrustee with the powers granted by the instant trust could not, we submit, convert the trust into a transfer intended to take effect only at death.

Trustees Had Only Powers Required for Normal Administration.

The fact that decedent was one of the trustees is, of itself, of no significance. A trust is equally effective whether the settlor or a third party is trustee. See *Reinecke* v. *Northern Trust Company*, *supra*, 278 U. S. at p. 346; Restatement of Law of Trusts, § 100.

The trustees, under the Spiegel trust, had powers only sufficiently broad to permit reasonably efficient administration. They were the powers generally given to trustees of securities, namely (R. 86) to (a) hold, manage and control the trust estate, (b) sell, exchange, transfer or otherwise

dispose of the trust property, (c) invest and reinvest proceeds of sales, and (d) take action required to be taken by a holder of securities in the trust. All income was required to be paid out to the beneficiaries or used for their benefit (R. 86). The trustees had no power to accumulate or withhold income. They had no discretion to determine which receipts should be credited to, or which expenses charged against, income or corpus. They were given no authority to borrow money or to pledge the trust estate. They had no power to postpone or accelerate payment of corpus. They were not relieved of liability for malfeasance. They had no power to designate successor trustees. In short, the powers granted the trustees were only "broad" enough to permit them to act as trustees—to administer. More restricted powers would have made the trust impractical and unworkable.

Every trustee must have power to hold, manage and control the trust estate; that is the primary (if not the exclusive) function of an active trustee. See Restatement of Law of Trusts, § 186 (*d*). The powers of the trustees, here, are so usual and commonplace that, under Illinois law as now in force, a trustee has, solely by virtue of being trustee, power to sell and otherwise dispose of trust property upon such terms and conditions as he deems for the best interests of the trust and to invest and reinvest the trust estate as a prudent man, even though the trust instrument does not make any express grant of such powers. Ill. Rev. Stat. 1947, Ch. 148, §§ 32, 35. See also Restatement of Law of Trusts, §§ 190, 193, 227. Fiduciaries in Illinois may, without any specific grant, vote, or give proxies to vote, securities belonging to their trusts. Ill. Rev. Stat. 1947, Ch. 148, § 35; Ch. 32, § 157.30.[10]

10. Under the laws of many other states, a trustee has the power to vote, or give proxies to vote, shares of stock. See, for example, Deering's *California* Corporate Code (1947), sec. 2218; 1935 Rev. Code of *Delaware*, Ch. 65, sec. 18; *Massachusetts* Ann. Laws (Michie) Ch. 155, sec. 21; *Michigan* Ann. Stat. (Callaghan)

Reinecke Answered the Same Question in the Negative.

The Court considered, and was required to decide, this same question—whether retained powers of administration operate to make a transfer effective only at death—in *Reinecke* v. *Northern Trust Company, supra.* Although the settlor, there, was not a trustee, he had reserved power to control certain action of the trustee. In reality, the *Reinecke* settlor reserved substantially broader powers than those granted to Spiegel and his cotrustee and Respondent, in his *Reinecke* brief (pp. 30-31), argued that:

> "The settlor by virtue of the five trusts *retained to a large degree the management and control and had a substantial interest in the trust property until his death.* The trustee was to be 'governed by any instructions or directions in writing given to it by [the settlor] in regard to the management, sale, or investment of any part of said trust estate.' * * * The trustee was required to execute proxies as requested by the founder, thus enabling the founder to vote the stock in his discretion. * * * The trustee was required to 'observe and be governed by any instructions or requests in relation thereto (to real estate) made by an instrument in writing, signed by' the founder. * * * In case of the resignation or disability of any trustee the founder retained the power to appoint a successor. * * * He had a restricted power [with the consent of an interested beneficiary] to alter, change, or modify the terms of the trust. * * * *He thus retained, for his lifetime, complete dominion over the property as distinguished from the beneficiaries' interest in the income and corpus of the trust.* This dominion ceased at his death, and it is submitted that this cessation was the cessation of an interest sufficient to support the tax." (Italics ours.)

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sec. 21.33; *New Jersey* Stat. Ann., sec. 14:10; *New York* Stock Corporation Law, sec. 47 (*In re Ebbets' Will*, 248 N.Y.S. 179; *William Randall & Sons* v. *Lucke*, 205 N.Y.S. 121); Page's *Ohio* General Code, sec. 8623-51; Purdon's *Pennsylvania* Ann. Stat. tit. 15, sec. 107.

The Court, however, rejected Respondent's contention and concluded (*Reinecke* v. *Northern Trust Company*, *supra*, at pp. 346-7):

> "Nor did the reserved power of management of the trusts save to decedent any control over the *economic benefits or the enjoyment of the property.* He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. *The shifting of the economic interest in the trust property which was the subject of the tax*, was thus complete as soon as the trust was made. His power to recall the property and of control over it *for his own benefit* then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax." (Italics ours.)

A Trustee's Powers May Not Be Exercised for the Benefit of the Trustee.

If there are to continue to be active trusts, there must be trustees, who, by virtue of their office, have power to administer and act. However, a trustee takes no economic interest in trust property by reason of powers granted to or retained by him as trustee. Such powers must be exercised, not for the trustee's own individual benefit, but for the sole benefit of the beneficiaries. See *Michoud* v. *Girod*, 4 How. 503, 555 (1846); *Magruder* v. *Drury*, 235 U. S. 106, 119 (1914); *Kinney* v. *Lindgren*, 373 Ill. 415, 422 (1940). Retained powers of administration and management, therefore, are not the substantial equivalent of a taxable interest in trust property unless the settlor-trustee, by virtue thereof, retains control over the economic benefits of the trust property. Thus, the Supreme Court of Illinois, in *People* v. *Moses*, 363 Ill. 423 (1936), dealing with an inheritance tax on a transfer al-

leged to take effect at or after death, laid down substantially same rule as did this Court in *Reinecke*, saying:

> (p. 427) "A transfer intended to take effect in possession or enjoyment at or after death is a disposition in which *the donor retains the economic interest or enjoyment of property during his life* and is taxable. * * * A gift or transfer *inter vivos*, not made in contemplation of death, which is *bona fide*, completed and immediately effective and *in which no beneficial enjoyment is reserved by the donor*, is not subject to tax under the act. * * * (Italics ours.)

On the same theory, Respondent's *Clifford* Regulations provide that administrative control of a trust will not render *income* taxable to a settlor (as his income) unless the control is "*exercisable primarily for the benefit of the grantor rather than the beneficiaries of the trust.*" Regulations 111, sec. 29.22(a)-21(e). Administrative control, exercisable primarily for the benefit of the settlor, is defined by the Regulations as (a) power which enables the grantor to purchase, exchange, otherwise deal with, or dispose of corpus or income for less than an adequate and full consideration in money or money's worth, or (b) power which enables the grantor to borrow corpus or income without adequate interest or without the same security as must be obtained from a third party, or (c) power to withhold, for more than a year, repayment of corpus or income borrowed by the grantor, or (d) any one of certain powers of administration, "*if exercisable in a non-fiduciary capacity*," namely, power to vote stock or other securities, to control investment of trust funds, or to reacquire trust corpus by substituting other property of an equivalent value. The Regulations, however, provide that, if a power is exercisable by a person as a trustee, it is presumed that it is exercisable in a fiduciary capacity and primarily in the interest of the beneficiaries, and such presumption may be rebutted only

by clear and convincing proof that the power is *not* exercisable primarily in the beneficiaries' interests. The mere fact that a power, exercisable by the trustee, is described in broad language does not, under the Regulations, indicate that the trustee is authorized to deal with the trust property in a non-fiduciary capacity.

Spiegel's Powers, as Cotrustee, Gave Him No Control Over Economic Benefits or Enjoyment.

Spiegel had no power under the instant trust except as a cotrustee. He had no control exercisable for his own benefit or in any non-fiduciary capacity. He had no power to (and he did not) borrow from the trust on any terms. He had no power to (and he did not) purchase or otherwise acquire property of, or deal with, the trust estate. It is stipulated (R. 25) that all of the income of the trust was paid to or used for the benefit of the beneficiaries thereof, as provided in the trust. The trust estate, for many years prior to Spiegel's death, consisted of a widely diversified portfolio of general market stocks and bonds. At his death, there were 138 different items of securities held in the trust (R. 10-21). The control (whether by voting or otherwise) of those securities was of no economic advantage to the trustees as individuals.

As Mr. Justice (then Judge) Cardozo put it, in *Carrier* v. *Carrier*, 226 N. Y. 114, 125-26 (1919), where the settlor had retained much broader powers than did Spiegel:

> "It is true that the creator of this trust had reserved to himself the broadest rights of management. His discretion was to be 'absolute and uncontrolled.' That does not mean, however, that it might be recklessly or willfully abused. *He had made himself a trustee: and in so doing he had subjected himself to those obligations of fidelity and diligence that attach to the office of trustee.* He had power to 'invest'

> the moneys committed to his care. He had no power, under cover of an investment, to loan them to himself. *His discretion, however broad, did not relieve him from obedience to the great principles of equity which are the life of every trust* * * *." (Italics ours.)

See also, to the same effect, *Stuart* v. *Commissioner*, 124 F. 2d 772, 778 (CCA 7th, 1941), citing Illinois authorities (reversed on other grounds, 317 U. S. 154); *Blunt* v. *Kelly*, 131 F. 2d 632, 634 (CCA 3d, 1942); *Hall* v. *Commissioner*, 150 F. 2d 304, 307-8 (CCA 10th, 1945); Restatement of Law of Trusts, § 170 and Illinois Annotations thereto, § 170.

The trustees, here, had to have sufficient control over the trust assets so that they could keep the property prudently invested, earning income for the beneficiaries and intact upon distribution. The control granted to the trustees by the instant trust, was, however, no greater than necessary for those purposes. The powers were, certainly, not broad enough to render the trustees, in substance, owners of the trust property for their own benefit. They were not broad enough to change an immediate transfer into one which took effect only upon the death of the settlor.

Question 7. In the light of this Court's opinion in Helvering v. Hallock does the Hassett v. Welch (303 U. S. 303) interpretation of the 1931 congressional resolution have controlling relevance in determining whether the estate tax shall be applied to the Church properties transferred to beneficiaries under a trust created before 1931 but in which Church retained the net income from the trust properties during his life?

This question is applicable only to *Commissioner* v. *Church*, *supra*.

Question 8. Assuming that under the "refined technicalities of the law of property" the "possession and enjoyment" of the trust properties here be deemed to have passed to the beneficiaries when the trust was created, are the transfers so much "akin to testamentary dispositions" as to make them subject to the estate tax statutes? (See Helvering v. Hallock, p. 112.)

This question presupposes that the instant trust took effect in possession or enjoyment at its inception and that the decedent retained no interest therein. The assumption is, we submit, correct.

The Spiegel Trust Was Not Testamentary.

A testamentary disposition is, strictly, one which takes effect only at death and until then is ambulatory—of no force or effect. Thus, it is said, in *Ireland* v. *Lester*, 298 Mich. 154 (1941), that:

> (p. 158) "An instrument that is testamentary in character operates only upon and by reason of the death of the maker. Till then, it has no effect or force, and it is this ambulatory quality which is a characteristic of wills. * * *"

See also, *Koppelkam* v. *First Wisconsin Trust Co.*, 240 Wis. 254, 256-7 (1942); Restatement of Law of Trusts, § 53(*a*). The trust at bar was not ambulatory and clearly was not a testamentary disposition.

The Trust Was Not Akin to a Testamentary Disposition.

This Court has held that certain transfers, which are *akin* to testamentary dispositions, are taxable under section 811(c) as transfers intended to take effect in possession or enjoyment at or after death. But the trust, here, took effect immediately and was not *akin* to a testamentary

disposition. Under the laws of Illinois, the trust property passed, irrevocably and without any retained string or tie, to trustees for the beneficiaries when the trust was created. Spiegel, in 1920, gave the trust property away, and the gift was in no way contingent upon his death. Regardless of when he died (whether before or after the beneficiaries), his interest in the trust ceased when the trust was set up. See *supra*, p. 6.

Applying the tests for identification of an *inter vivos* transfer which is "resorted to as a substitute for a will", set up in *Goldstone* v. *United States*, 325 U. S. 687, 690-2 (1945), the trust here did not make "dispositions of property operative at death", the "ultimate possession or enjoyment" was not "held in suspense until the moment of the decedent's death", the "ultimate disposition of the proceeds" of the trust was not "suspended until the moment of decedent's death", and decedent did not possess a reversionary interest at the time of his death, "delaying until then the determination of the ultimate possession or enjoyment of the property". Here, there was an immediate disposition of the property in 1920. Income was paid to beneficiaries throughout the life of the trust. Cf. *Vanderlip* v. *Commissioner*, 155 F. 2d 152, 154 (CCA 2d, 1946). The ultimate disposition of the proceeds of the trust was never suspended; the trust corpus was finally disposed of, from the date of the trust, to the beneficiaries, their next of kin or their legatees, regardless of whether the beneficiaries survived Spiegel. See Brief pp. 14-29, and Reply Brief pp. 2-12.

The transfer was not akin to a testamentary disposition under *People* v. *Moses*, *supra*, where the Court said (... Ill. at pp. 428-29):

> "The common reason inducing a man to make a benefaction by will rather than by present outright gift obviously is that he may retain the beneficial enjoyment and control thereof until his death. *If by a particular transfer the donor retains the fruits of the*

property during his life the transfer is in lieu of a testamentary disposition and subject to the tax, but it is otherwise where the donor by the *bona fide* terms of his act is immediately and absolutely divested of all enjoyment of the property. In our opinion that which determines whether the property transferred is subject to the tax is the substance and contemplated effect and purpose of the transaction and not its technical form. It is the aspect from the donor's part in the transaction which would seem to be of controlling importance in determining whether a particular gift *inter vivos,* which is not the ordinary absolute gift *in praesenti,* is a transfer in lieu of a testamentary disposition. * * *" (Italics ours.).

The Trust and Spiegel's Will Were Executed Years Apart and Made Different Dispositions.

Spiegel did not intend to resort to an *inter vivos* transfer as a substitute for a will. The record here shows an entirely different intent. See Question 2, *supra,* pp. 16-26. Spiegel's will was drawn 18 years after the execution of the trust and left three-fourths of his residuary estate to one daughter, one-fourth to his other daughter and nothing to his son (R. 117-9). This was a very different disposition from that provided by the trust which gave equal shares to each of the children.[11]

11. A substantial interval of time between the creation of an *inter vivos* trust and the execution of the settlor's will has been held to negative characterization of the trust as a testamentary substitute. See *Wishard* v. *United States,* 143 F. 2d 704, 708 (CCA 7th, 1944)—6 years; *Blakeslee* v. *Smith,* 26 F. Supp. 28, 34 (D. C. Conn., 1939), affirmed, 110 F. 2d 364 (CCA 2d, 1940)—4 years; *Root* v. *United States,* 56 F. 2d 857, 858-59 (D. C. Fla., 1931)—13 months; *Estate of T. M. Flynn,* 3 T. C. M. 1287, 1289 (1944)—4 years; *Estate of M. E. Girvin,* 3 T. C. M. 1290, 1291 (1944), reversed on other grounds, 155 F. 2d 1 (CCA 9th, 1946), certiorari denied 329 U. S. 725 (1946)—8 years; and *Estate of Henry N. Dodge,* CCH Dec. 12,113-H, at p. 35,986 (1941)—8 years. Differences between the disposing provisions of a trust and the settlor's will, likewise, have led courts to decide that a trust is not a substitute for a testamentary disposition. See *Wishard* v. *United States, supra; Blakeslee v. Smith, supra; Root* v. *United States, supra;* and *Estate of M. E. Girvin, supra.*

Reinecke Also Decided This Question.

The fact that the trust terminated at the death of the settlor or that the settlor retained, as a cotrustee and not for his own benefit, administrative control over the trust did not postpone effectiveness of the transfer and did not make it testamentary.[12] See Question 1, *supra*, pp. 9-12; Question 6, *supra*, pp. 28-34. There are no other circumstances in the instant case, which could possibly render the trust akin to a testamentary disposition.

Respondent argued in *Reinecke*, and there specifically presented for decision, the question whether the five *Reinecke* trusts were akin to testamentary dispositions. Respondent's *Reinecke* brief stated (pp. 29-30):

> "* * * it is now necessary to determine whether or not the five trusts of 1919 * * * are *testamentary in character.* * * *
>
> "This Court in that case [*Nichols* v. *Coolidge*, 274 U. S. 531] determined the section [402(c) of the 1918 Act] to be unconstitutional in that it attempted to tax a past lawful transaction which was not testamentary in effect. Such a state of facts is not here present. *The transaction in this case is testamentary.* Under it the settlor retains an interest up to the moment of his death and the passage to the beneficiary of corpus can not take place until the settlor's death.
>
> "This court has described the Federal estate tax as being one imposed upon an 'interest which ceased by reason of death.' *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61. An instrument creating a trust may be so limited in its scope that its execution and delivery do not operate to

12. 1 Scott, Law of Trusts, p. 340, f.n. 2: "If the settlor does not reserve power to revoke the trust, the reservation of power to control the administration of the trust does not make the trust testamentary. See *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 * * *. The power to control in such case is not unrestricted but is limited by the purposes of the trust." See also, *Commissioner* v. *Kellogg*, 119 F. 2d 54, 57-8 (CCA 3d, 1941).

terminate this interest. The transmission is not complete as to the founder until he has parted not only with the title but also with the use, enjoyment, and dominion." (Italics ours.)

Respondent then argued (*Reinecke* brief, pp. 30-31) that, because of retained power of management and control and alleged substantial interest in trust property until the settlor's death, the *Reinecke* trusts were testamentary in character. See pp. 30-31, *supra*. The Court in *Reinecke*, however, rejected the contention and held that the five trusts there involved were *not* testamentary in character and *not* taxable under the counterpart of section 811(c) then in force.

The trust, here before the Court, was an immediate gift of both income and principal of the trust property. It disposed of that property once and for all. Like *Reinecke*, there was nothing about the transfer here which made it akin to a testamentary disposition.

Question 9. What is the effect of the rulings of Helvering v. Clifford (309 U. S. 331) upon these trusts?

Respondent did not base his deficiency claim on any *Clifford* theory (R. 21). He did not contend in the Tax Court (R. 29-30) or the Court of Appeals (R. 135), and has not argued in this Court, that *Clifford* is applicable. This Court said in *Helvering* v. *Fuller*, 310 U. S. 69 (1940):

(p. 76) "As we have seen, respondent did retain considerable control over the trusteed shares. But that was not the basis for the assessment of the deficiency by the Commissioner. It was not passed upon by the Board of Tax Appeals or the Circuit Court of Appeals. It was not included in the petition for certiorari among the errors to be urged or the reasons for granting the writ. Nor did petitioner brief or argue the point here. Hence we do not pass on the applicability of the rule of *Helvering* v. *Clifford*, *supra*, to these facts. Cf. *Helvering* v. *Wood*, 309 U. S. 344."

The Tax Court Held Decedent Was Not the Owner of Trust Corpus.

Be that as it may, the Spiegel trust was not, in any event, a *Clifford* trust for income tax purposes, and is not a *Clifford* trust for estate tax even assuming that *Clifford* principles are applicable to estate taxes.[13] The basis of *Clifford* is set out in the Court's opinion as follows:

(p. 335) "In this case *we cannot conclude as a matter of law* that respondent ceased to be the owner of the corpus after the trust was created. Rather, *the short duration of the trust*, the fact that the wife was the beneficiary, and the retention of control over the corpus by respondent all lead irresistibly to the conclusion that respondent continued to be the owner for purposes of § 22(a).

(p. 336) "* * * Our point here is that no one fact is normally decisive but that all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership and *are appropriate foundations for findings on that issue*. Thus, where, as in this case, the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership, *we cannot say that the triers of fact committed reversible error* when *they found* that the husband was the owner of the corpus for the purpose of § 22(a). * * *" (Italics ours.)

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13. In *Clifford*, the Court, referring to the definition of "gross income" in the income tax law. (§ 22(a)), said (p. 334):

"The broad sweep of this language indicates the purpose of Congress to use the full measure of its taxing power within those definable categories. * * * Hence our construction of the statute should be consonant with that purpose."

Apart from any question of constitutionality of application of *Clifford* to estate taxes, the estate tax laws do not evidence the purpose of Congress to use its full power to tax transfers at death. *Helvering* v. *Safe Deposit & Trust Co. of Baltimore*, 316 U. S. 56, 58-60 (1942), and opinion below, 121 F. 2d 307, 311-313 (CCA 4th, 1941). Further, section 811(c) of the Code applies to specific (not general) transfers and is not comparable to the sweeping coverage of section 22(*a*) of the income tax law. Cf. *Commissioner* v. *Prouty*, 115 F. 2d 331, 337 (CCA 1st, 1940).

The Court, there, refused to hold *as a matter of law* that the finding of the Tax Court (that Clifford was, for practical purposes, owner of the trust income) was erroneous. In the instant case, the Tax Court held (R. 129) that the settlor was not the owner of trust corpus prior to or at the time of his death, and the Court, here, cannot conclude *as a matter of law* that the Tax Court's holding was erroneous.

Spiegel Had No Right to Get Corpus Back.

However, even if this Court would undertake to try the facts *de novo*, it must, we submit, find that the case at bar is not a *Clifford* case. While no one provision is controlling, the "bundle of rights", which, under *Clifford* principles, operates to make income taxable to a settlor, must include the right, among others, to get trust corpus back within a definite and short period.[14] In *Clifford*, the trust terminated in five years or sooner upon the death of either the settlor or his wife (the income beneficiary), and, upon termination, corpus would return to the settlor. Long prior to the *Clifford* decision, short term trusts had been used by taxpayers in order to reduce income taxes.[15] Accordingly, certiorari was granted in *Clifford* (p. 334):

> "because of the importance to the revenue of the United States of the use of such short term trusts in the reduction of surtaxes."

14. Decisions such as *Commissioner* v. *Buck*, 120 F. 2d 775 (CCA 2d, 1941), are not inconsistent. Those cases apply *Clifford* rulings where although the settlor has no right to get corpus back, he has such control over disposition of income and corpus (lacking here) as to make him as much the owner of the trust *res* as if he were entitled to receive it back within a short time.

15. The Tax Court's *Clifford* decision (37 CCH Dec. 10,446 B, 1938, affirmed, 309 U. S. 331) was based upon *Wollman* v. *Commissioner*, 31 B. T. A. 37 (1934); *Rands* v. *Commissioner*, 34 B. T. A. 1107 (1936) and *Corning* v. *Commissioner*, 36 B. T. A. 301 (1937), each of which had decided that the settlor of a short term trust was liable for income taxes on trust income, although he did not actually receive the income.

See *Harrison* v. *Schaffner*, 312 U. S. 579, 583 (1941); *Helvering* v. *Elias*, 122 F. 2d 171, 172-3 (CCA 2d, 1941); *Jones* v. *Norris*, 122 F. 2d 6, 11 (CCA 10th, 1941); *Stuart* v. *Commissioner*, 2 T. C. 1103, 1113 (on remand from Supreme Court, 1943). Cf. T. D. 5488: The Treasury Interpretation of the Clifford Rule, 46 Col. L. Rev. 601, 605-6 (1946).

In the case at bar, Spiegel could never have recovered corpus. Even on Respondent's erroneous theory, he could have received corpus back only if he survived three children and three grandchildren. However, Respondent does not contend that Spiegel retained any *right* (as distinguished from a possibility) ever to get corpus back and it would be utterly unrealistic to include in any "bundle of rights", retained by Spiegel, that remote possibility assuming it existed.

Spiegel's Power to Administer the Trust, as Cotrustee, Did Not Make Him Owner of Corpus for Practical Purposes.

Certainly, decedent's control of administration of the instant trust, as a cotrustee, was not sufficient to make him the owner of the trust property as a practical matter. His control was solely as a fiduciary and not in his own interest, and gave, and under the law could give, no economic advantage to him personally. See *Cushman* v. *Commissioner*, 153 F. 2d 510, 514 (CCA 2d, 1946). See also, Questio. 6, *supra*, pp. 28-34.

In *Commissioner* v. *Branch*, 114 F. 2d 985 (CCA 1st, 1940), the court affirmed the decision of the Tax Court that income of a trust was not taxable to the grantor. In distinguishing the case from *Clifford*, the court said:

> (p. 987) "In common with *Helvering* v. *Clifford*, 309 U. S. 331, * * * the grantor in the present case has made himself trustee with broad powers of management, and named his wife as beneficiary. There the

correspondence ends. *An important feature of the Clifford case was that the trust was of short duration* * * *. *In the Clifford case the corpus would surely revest in the grantor at the end of five years, and maybe sooner.* Here the corpus will revest in the grantor only in the event that he outlives his wife, and even this possibility of reverter is subject to be extinguished if the wife exercises her power to appoint the trust estate to new uses or to terminate the trust and to vest the corpus in herself. * * *

"*Helvering* v. *Clifford* rests on its particular facts, as the court was careful to say. * * * *Where the grantor has stripped himself of all command over the income for an indefinite period, and in all probability, under the terms of the trust instrument, will never regain beneficial ownership of the corpus, there seems to be no statutory basis for treating the income as that of the grantor under Section 22(a) merely because he has made himself trustee with broad power in that capacity to manage the trust estate.* * * *" (Italics ours.)

In the case at bar, as in *Branch*, corpus could never revest in the grantor or, on Respondent's theory, only upon the happening of a contingency which almost certainly would not (and, in fact, did not) occur. At most, in the instant case, the settlor retained power to administer the trust estate as a cotrustee.

In *Dunning* v. *Commissioner*, 36 B. T. A. 1222 (1937), the Commissioner urged that the petitioner there was taxable as the owner of trust income (in fact payable to his wife) because of his retained control over the trust. The trustees were the grantor and a trust company. The Tax Court, holding that the settlor's retained control was not sufficient to render him owner of the trust income, said (pp. 1227-28):

"We do not believe that petitioner could be taxed upon the income of a trust only because he made himself a trustee, or one of the trustees, and the powers to supervise the investment of trust property, to sell

and reinvest trust property, to vote stock held by the trust, and to generally manage the trust property are all part of the normal powers of a trustee. Petitioner perhaps had more confidence in his own judgment in these matters than he had in the judgment of the co-trustee, a trust company, and his assignment of these powers to himself as trustee to the exclusion of the other trustee does not appear to be a reasonable ground for sustaining the first contention of the respondent. * * *"

In *Estate of Downe* v. *Commissioner*, 2 T. C. 967 (1943), the Commissioner had included the value of the corpus of two trusts in gross estate for estate tax purposes. The grantor was not trustee but had reserved the right to require the trustee to issue proxies, and to retain, sell, exchange, invest and reinvest any of the trust property, in such manner as the settlor might direct. The Tax Court held that the corpus of the trusts was not properly included in gross estate, saying:

(p. 974) "The third ground for respondent's contention that the trust corpus should be included in the estate of decedent is that decedent retained such economic control over the corpus that he must be regarded as the owner thereof within the rule announced in *Helvering* v. *Clifford*, 309 U. S. 331; and that therefore the value of the corpus is includable in decedent's estate under section 302(a) and (c) of the Revenue Act of 1926, as amended.

"We think that this ground is also untenable under the reasoning and holdings in *Commissioner* v. *Branch*, 114 Fed. (2d) 985; *Emma B. Maloy, supra*; and *George H. Whitely*, 2 T. C. 618. * * *

"While the *Branch* and *Maloy* cases just above cited involved income and not estate tax, the fundamental and essential question for decision in each was whether the grantor of a trust should be regarded as the owner of the corpus within the rule of the *Clifford* case. In each case the solution of this question depended alone upon the effect of a provision of a trust instrument

involved whereby the grantor (individually in the *Maloy* case, and as cotrustee in the *Branch* case) retained control of sales, investments, and reinvestments of the trust property as did the decedent, grantor, here. The effect of this provision was the only ground assigned by the Government in those cases for the application of the rule in the *Clifford* case, and assuming, although not so deciding, that the rule in the *Clifford* case is applicable here under section 302(a) and (c) of the Revenue Act of 1926, as amended, we, for similar reasons as stated in the *Maloy* case, reach the same conclusion as to the trust corpus here involved, as was there reached as to the trust there involved *i. e.*, that the trust corpus here does not come within the operation of the rule announced in the *Clifford* case and that consequently its value is not includable in decedent's estate by reason of that rule."

The Trust at Bar Was Not a Clifford Trust Even for Income Tax Purposes.

So far as income taxes are concerned, the instant trust would not be a *Clifford* trust under Respondent's Regulations. Section 29.22(a)-21 of Regulations 111 provides, generally, that income of a trust is taxable to the grantor, although not payable to him, if he retains control of the trust so complete that he is, in practical effect, still the owner of the income. The Regulations go on to state (section 29.22(a)-21(b)) that, in conformity with the practical ownership principle, income of a trust is attributable to the grantor if:

"(1) the corpus or the income therefrom will or may return after a relatively short term of years * * *;

(2) the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition * * *, whether by revocation, alteration or otherwise, exercisable by the grantor, or another person lacking a substantial adverse interest in such disposition, or both * * *; or

(3) the corpus or the income therefrom is subject to adminstrative control, exercisable primarily for the benefit of the grantor * * *."

Neither corpus nor income of the instant trust could have returned to Spiegel after a "relatively short term of years" or, we submit, ever. "Beneficial enjoyment" of neither corpus nor income was subject to any power of disposition by the settlor. Neither corpus nor income was subject to any adminstrative control "exercisable primarily" (or to any extent) for the benefit of the settlor.[16] Thus, although the Regulations have stretched *Clifford* to (or beyond) the breaking point, they still do not purport to tax a trust such as the Spiegel trust.[17]

Clifford principles, even if applicable to estate taxes, would not apply to the instant case because the most essential of the elements, making up the bundle of rights which renders a grantor taxable on income of a trust—the right to get a corpus back within a definite, short period—is lacking. Further, such control as Spiegel had as a co-trustee was not exercisable by him for his own benefit, gave him no economic interest in corpus and was clearly insufficient to render a decedent-settlor taxable under section 811(c) of the Code. This Court (on the authority of *Clifford*) said in *Helvering* v. *Stuart*, 317 U. S. 154 (1942):

(p. 169) "* * * broad powers of management in trustees, even though without adverse interest, point to complete divestment of control, as does the impossibility of reversion to the grantors."

16. See Reg. 111, § 29.22(a)-21(e) and pp. 32-33, *supra*, for examples of control exercisable primarily for the benefit of the settlor personally. See also, T. D. 5488: The Treasury Interpretation of the Clifford Rule, 46 Col. L. Rev. 601 (1946).

17. Respondent was applying the principles, recognized in *Clifford*, during years at least as early as 1930. See *Woilman* v. *Commissioner*, 31 B. T. A. 37 (1934). Nevertheless, no claim was made, during Spiegel's lifetime, that he was liable for income taxes on the trust income.

CONCLUSION.

Spiegel, at his death, had no interest or possibility of interest in the trust property and, accordingly, corpus of the trust may not be included in gross estate for estate tax purposes. However, even if the Court should hold that he retained a remote possibility of reverter by operation of law, nevertheless corpus should not be included in gross estate since the record here is clear that decedent did not intend to retain any interest or possibility of interest in the trust property and, therefore, did not make a transfer intended to take effect only at death. It is not even claimed that he retained any interest of substance.

Petitioners do not seek to take advantage of refined technicalities of the law of property. Our position is that, since Spiegel, at his death, retained no interest in the trust property, his estate is not liable for estate tax on account of a non-existent interest. The estate is not sheltering itself behind technicalities when it argues that it should not be taxed on account of *nothing*. The "technicality" shoe is on the other foot. It is only after conjuring up a remote (and non-existent) possibility of reverter by operation of law—a refined technicality if ever there was one—that Respondent claims to find that decedent had an interest in corpus at the date of his death.

Substance and not form should prevail. As the dissenting Justices said, in *Goldstone v. United States*, 325 U. S. 687, 694:

> "We have recently been told that the question whether, within the intent of the Revenue Acts, a transfer is 'intended to take effect in possession or enjoyment at or after' the grantor's death is to be decided not by the terminology of conveyancing or the ancient real property law respecting vested and contingent estates, possibilities of reverter, and the like.

> We have been warned that the taxpayer and his estate must have regard to substance rather than to form, in answering the question whether the transfer becomes complete only at the transferor's death. I have assumed that the tax gatherer could not ignore the same test.* * *"

As a matter of substance, Spiegel, at his death, did not, on any theory, have any interest in corpus. His estate should, accordingly, not be taxed on account of that corpus.

The order of the Court of Appeals should be reversed and the Tax Court should be affirmed.

Respectfully submitted,

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